Quantum Meruit Claims and the Assessment of Benefit and Enrichment

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1. Introduction

In the current extremely dynamic and competitive construction environment, it is common for contracting parties to end up in a situation where there is a need to make claims for reimbursement of costs. The premise for the claims is that costs cannot be recovered adequately under the current contract, for one reason or another. This claim occurrence has lead to the development of claim mechanisms, with quantum meruit claims being of particular note. The quantum meruit applications are not just been limited to rescinded contracts, where clearly the contract cannot be used for reimbursement of costs. The quantum meruit claim practice has also spread to other situations where the contractor (plaintiff) believes they have not been appropriately compensated for costs, hence their subsequent claim against the client (defendant).

For a plaintiff to claim for lost earnings through a quantum meruit claim, it is necessary for the establishment and eventually convincing of the court that there is a benefit to the defendant and an unjust enrichment flowing from the benefit.

While the principle of quantum meruit claims may appear straightforward for a rescinded contract, the evaluation of benefit is very subjective, so it becomes difficult to apply a standard basis of application. In several cases where benefit was evaluated and held for the plaintiff, the cases were distinguished or over ruled in subsequent cases. Whilst initially plaintiffs sought tangible benefits, recently intangible benefits have been sought and damages won. Hence, there is substantial documented case material for both the plaintiffs and defendants in the argument of quantum meruit claims and in particular the claim for benefit and unjust enrichment.

Unfortunately, due to the subtle differences between cases, that may receive distinguishing treatment, the application of a number of preceding cases is difficult. The subjectiveness of these case applications and the individual assessment by judges creates uncertainty in this area. Even different judges presiding over different cases, could use differing specific cases for their decisions.

The research in this paper will investigate the assessment of the benefit and the unjust enrichment to a defendant, focusing on a subset of frequently referenced cases, with a

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discussion on how these cases have been treated subsequent in the courts. The cases included in these investigations are listed below.

1. Sabemo Pty Ltd v North Sydney Municipal Council [1977] 2 NSWLR 880
2. Jennings Construction Ltd v Q H Birt Pty Ltd (1988) BC 8801198
3. Pavey & Matthews Pty Ltd v Paul (1987) BC 8701760
4. Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) BC 9203258
5. Brenner v First Artists' Management Pty Ltd [1993] 2 VR 221
6. WC Gray (Constructions) Pty Ltd V Hogan [2000] BC 2000 00871

Although all these cases held for the plaintiff, each has their own distinction in basis and evaluation of quantum meruit, as the circumstance in each individual case differed. These are the final cases, and are the end of a string of cases, that may have gone either way for plaintiff and defendant.

Section 2 of the paper discusses the basis of quantum meruit claims, and the principals used.

In Section 3 the benefit and unjust enrichment component of quantum meruit claims is investigated.

In Section 4, the application of quantum meruit in recent pertinent cases is discussed, to formulate the background and set precedence for these claims.

Section 5 investigates the significance of the quantum meruit claims discussed in Section 4, to evaluate their value in case precedence.

In light of the discussed preceding cases, the impact on future claims of a similar nature is examined in Section 6.

Section 7 concludes the paper, with a summary and discussion of findings on the study into quantum meruit claims through this research.

2. Quantum Meruit Claims Basis

Quantum meruit claims have evolved from the very early idea of indebitatus assumpsit where a plaintiff alleges a debt then a promise of consideration for the debt for works done and that the defendant has promised to pay the plaintiff for the debt. The quantum meruit claim is for situations where works have been done by the plaintiff, either partly or to completion, for a defendant who accepts the works and the benefit ensuing, or there is no contract (either by rescission, or otherwise) by which to measure costs for the works. As a result of this benefit if the defendant has received an unjust enrichment then the defendant owes the plaintiff what he reasonably deserves.

The benefit, which results in an unjust enrichment, has been determined to mean different things for differing situations. It can arise from the simple case where a builder completes a house for a client. There are several cases where this situation has occurred, most notably Pavey & Matthews v Paul, and this case has been used many times subsequently. The benefit in this situation is tangible and clear, especially as in the case of Pavey, where the building works had been completed, and so the specific benefit in these circumstances was that the client could move in to building and receive its enjoyment.

Benefit and unjust enrichment can extend to preliminary works and proposals completed by a single preferred contractor (post tender, pre award), as in the case of Sabemo v North Sydney Municipal Council. In the Sabemo case the benefit is less evident, as the development was cancelled, and the proposals developed could not be used on either this site or future sites. The benefit assessment determined that there was an actual benefit, as the defendant could use the proposals should the development proceed.

There are more unique situations that have been widely used since the Sabemo case. One particular instance is in service contracts, where the benefit is considered to be the plaintiff merely being in attendance, which may or may not produced any identifiably benefit to the defendant.

There have been many interpretations on the meaning of the phrase *"what the plaintiff reasonably deserves"*, as the phrase can mean several things.

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- The costs that a contractor would have experienced in completing the work. In other words, the competitive market rate for similar work. This implies that the original contract value creates some ceiling on the valuation.

- The costs the contractor actually experienced extended to include profit and overhead. This is especially valid for cases where delays and disruption have prevented the contractor from proceeding in a manner that would reflect market rates.

- It can also be extended further to what the value the benefit is to the defendant, this can work against the contractor, as simply put, an extension on a house may not return the full value of the work upon sale of the house.

The claims generally commence from an act of repudiation, termination or cancelling for the Client's convenience, or the circumstance where a contract between the Client/ Principal and the contractor has not been reached and the works have been cancelled. The contractor is aggrieved and seeks a claim, rather than damages and the balance of money owed, consisting of what they believe they reasonably deserve. This claim could include a valuation for unpaid work, delays and disruption, etc. Using a slightly different perspective, the contractual quantum meruit claim also exists where the contract is still on foot, but the work bear no resemblance to that originally detailed in the scope and context of the contracts, hence they are significantly different. The basis for one to call the works "significantly" different is that the scope or nature of work has changed; hence the argument develops that if the scope/nature is different, then the contract cannot be applied, and another mechanism is required for the evaluation of compensation for these works.

Contract termination assumes the contact existed and could be applied in the first instance; hence the ability to claim damages survives the contract termination. In contract rescission or change in scope the claim is treated as if the contract did not exist, and there is a full or part failure in consideration. If the work has been completed, as with Gray or Pavey and Matthews, a quantum meruit claim can still exist, but in these cases there was not a contract to start with. There has been at least one case, where there existed a

contract, namely Morris-Knudson[1], and the works and the contract had been completed, the quantum meruit claim was not held, the fact that the contract had been completed

The two main lines of the claim are:

1. Either the contractor sues for damages; due to loss in profit etc, maybe using the original contract as a basis.

2. Or to elect to rescind the contract either ab initio or in futuro, and then the contractor can claim for a reasonable and fair remuneration either on his costs or even with profit and overhead, on the basis for *"So much money as the plaintiff reasonably deserves to have"*[2]. There the original contract cannot be used to gauge the ceiling for payments as it legally never existed[3]. The valuation is based on two ideas

    a. the cost of completing the works in a market valuation (i.e. average cost that any contractor experience) plus a margin

    b. The value to the defendant. This has the potential to gain more for the contractor, especially for unique works, or in a rising market.

Generally these lines of argument are for contracts which have been cancelled, terminated, or even if the contractor defaulted in the eyes of the court.

There have been cases where the contract had not been formulated or signed. Here, the issues become more difficult, as usually tender lists are reduced to one preferred, and the Client has a responsibility to conduct the process with the utmost professionalism, and not engage a part for works without adequate contractual arrangements in place prior to works commencement.

The case where there is a contractual quantum meruit basis and the works have changed so significantly that they do not match that originally. This can be due to the Client varying the works significantly, but frustrating the works. There are several lines of argument that

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[1] Morris-Knudson Co Ltd v British Columbia Hydro Power Authority (1991)7 ConstLJ 227
[2] Pavey & Matthews v Paul (1987) BC 8701760
[3] Renard (1992) 26 NSWLR 234

do not use quantum meruit as the cornerstone, and usually these are much easier to prove.

The circumstance under which quantum meruit is applied in claims is varied and ever expanding. In the current legal environment, much case law exists to act as precedence to claims, but due to the wide and individual nature of its application it may be difficult to find substantial precedence of relevance to use to give strength to new cases.

The next section of the paper will discuss the role of benefit and unjust enrichment. The addition of assessment of benefit and enrichment moves away from the purely cost driven reimbursements. Some might say it provides the true compensation for works done and value gained.

3. The role of Benefit and Unjust Enrichment

The advancement to date in the application of quantum meruit claims has recently concentrated its focus on *benefit* and *unjust enrichment.* Benefit and its determination is the corner stone of quantum meruit claims, but its application can be very subjective, such as the case of Regalian and Sabemo. In the case of Regalian and Sabemo, the Client had no actual benefit for the works performed, as the project did not subsequently proceed. Hence, the work done or “benefit” could not be used, sold or other. Brenner demonstrates that the benefit, while experienced, could be thought of in terms of record sales - the Client did not achieve his aim, a successful comeback, and hence received no benefit.

Unjust enrichment is more easily understood, but there needs to be a partial or total failure of consideration before unjust enrichment exists. The circumstance of whether quantum meruit can be applied to projects when they have reached completion is also an issue. Under the current law and precedence, for the test of application of quantum meruit, completed projects would have been conducted under the agreement or inferred contract, and hence there was an arrangement in place and thus the basis of quantum meruit in a claim is unachievable (p 294 of notes by Mulheron). The determination of Benefit could be

a “reasonable” cost experienced by the contractor or even the cost of the project to the defendant, as in case of Boomer.[4]

Some distinct lines of thinking are evolving out of quantum meruit claims, particularly in regard to benefit and unjust enrichment. These lines can be summarised as:

- The concept of a benefit to a party and their benefit gained by an unjust enrichment. This basis diverges from some cases defining benefit differently.
- The simple concept of benefit for the plaintiff for the completed work not yet compensated for. The undertaking of work would never have been envisaged on a gratuitous basis.
- Benefits considered as tangible and intangible. Whether work done actually produced a benefit, as addressed in the Brenner and Sabemo cases. In the Brenner case, the assessment was based on whether the work done by the plaintiff was actually of any benefit. In the Sabemo case, the benefit, or lack there of, was actually the reason that the project did not proceed.
- Unjust enrichment is where the works that were not normally supplied gratuitously were supplied and the consideration was less than what would be reasonable and fair. This can extend beyond what consideration was contractually due, as with Birt, Renard and so on, as there may have been delays and disruptions that caused the reasonable and fair calculation to overtake that contractually due.

Hence, it is difficult to see one clear approach to the assessment of benefit or unjust enrichment. The varying slants of the foundation of claims have meant that its assessment has been approached from different angles. This variance can be of benefit, for providing many different ways of assessing claims relative to the particular case, or a drawback in finding overwhelming (or at least enough) precedence on which to base the case.

In order to understand the impact of case precedence in this area, several cases have been chosen for examination in detail. These case examinations are detailed in Section 4.

[4] Boomer v Muir 24 p 2d 570 (1933)

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4. Application in specific cases

The greater understanding of quantum meruit claim application and the specific assessment basis can be obtained by examining the specific case law on preceding cases. The research of case law in this paper will focus on the following recent six cases:

- Sabemo [1977]
- Jennings (1986)
- Pavey & Matthews (1987)
- Renard (1992)
- Brenner v First Artists' Management [1993]
- W C Gray (Constructions) [2000]

These case examinations will concentrate on four main aspects to provide the greater understanding of precedence and quantum meruit application. The aspects of these cases include:

a) Background of Claim

b) Circumstances under which quantum meruit is applied

c) Basis for case argument

d) Outcome of claim and significance of findings.

The details of the case examinations are contained in Section 4.1 to 4.6.

4.1. Sabemo [1977]

The factor of benefit and enrichment is addressed in the Sabemo case. The argument of benefit was difficult, as the defendant could not use any of the work done by the claimant, hence they belied there was no benefit, hence no need for compensation. The specific details are discussed following.

The North Sydney Municipal Council put the development of a site out for tender. After the tender list was shortened to one party, Sabemo, the developing proposals were progressed by Sabemo for the Council. After several revisions, the Council cancelled the work on the proposal, and decided not to proceed.

The basis for the claim used the William Lacey v Davis[5] case in which that the builder, William Lacey, supplied prices to do work on the belief that they would receive the contract[6]. The cost of the pricing of the work would be recovered under the future contract.

In Sabemo, the case was reduced to the following statement by J. Sheppard[7] :

> *".. where two parties proceed upon the joint assumption that a contract will be entered into between them, and one does work beneficial for the project, and thus in the interests of the two parties, which work he would not be expected, in other circumstances, to do gratuitously, he will be entitled to compensation or restitution, if the other party unilaterally decides to abandon the project, not for any reason associated with bona fide disagreement concerning the terms of the contract to be entered into, but for reasons which, however valid, pertain only to his own position and do not relate at all to that of the other party.*

The Sabemo case can be summarised in simpler terms. If *A* does work for *B* and which he believes in not gratuitous, then *B* should expect to reimburse *A* in a reasonable manner. There are of course clarifications and qualifications of this factor in cases such as

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[5] William Lacey (Hounslow) Ltd. v. Davis [1957] 1All E.R. 712
[6] Sabemo, [1977] 2 NSWLR 880 at 894
[7] Sabemo, [1977] 2 NSWLR 880 at 902

Sabemo. In this case, the Council's decision to cancel the project was not attributed to any error or omission by Sabemo and hence they required reimbursement.

The concept of a benefit to the Client was not considered in terms of the project's inability to proceed. The proposals were of no subsequent benefit to the Council, but they should have been a benefit if the project went ahead. Here the idea of unjust enrichment is difficult to define in the context of the project not proceeding, but simpler if the project goes ahead.

In summary, Sabemo showed that there was not a reliance on the benefit gained by the Client to be actually used, or to be transferable to another project.

4.2. Jennings (1986)

In the Jennings case, Birt was engaged to undertake earthworks, involving developing borrow pits in locations that Jennings had nominated. During the course of construction, Birt notified Jennings that the amount required to complete the works was in excess of that available out of the borrow pits and that another area would have to be found. Also during the construction Birt's rate of progress of works was questioned. The lack of progress was apparently due to material availability issues. Jennings issued Birt a Show Cause Notice, and after a time the contact between Jennings and Birt was terminated.

The matter went before an arbitrator who held a quantum meruit claim in favour of Birt. The matter was appealed to the Supreme Court of NSW, where Cole J held that the arbitrator did not err in holding that the appellant (Jennings) had repudiated the contract.

The basis for the application of quantum meruit in this case is founded on the fact that Birt was frustrated insofar as trying to progress the works. The *show cause notice* had no valid basis under the contract, so the resulting termination of the subcontract was effectively repudiated, leaving Birts to elect to claim under quantum meruit.

In the Jennings case, the Pavey and Matthews case was used to demonstrate the benefit and enrichment. Cole J[8] quoted Pavey and Matthews, and as Mason and Wilson JJ stated at 228 in Pavey and Matthews:

> *"However, when success in a quantum meruit depends, not only on the plaintiff proving that he did the work, but also on the defendant's acceptance of the work without paying the agreed remuneration, it is evident that the court is enforcing against the defendant an obligation that differs in character from the contractual obligation had it been enforceable."*

Cole J stated that where a party repudiates a contract, the innocent party may sue for work done (and not yet remunerated for)[9].

The Jennings case was appealed in the Supreme Court of New South Wales Court in the January following, but the case was dismissed and the original findings were held.

Jennings now plays a significant role in the background and basis of quantum meruit claims, particularly in repudiated contracts, as precedence for cases where the Client or Principal has frustrated the progress of the works, but they have issued show cause notices due to the lack of progress of the works.

4.3. Pavey & Matthews (1987)

The Pavey and Matthews case considers whether under an oral building contract, unenforceable under section 45 of the Builders Licensing Act 1971 (NSW) (s45 of the Act), a builder can bring an action in indebitatus assumptus[10].

Essentially, Pavey and Matthews worked on Mrs Paul's house on an oral contract arrangement, where the consideration was to be reasonable. The completed works

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[8] JENNINGS CONSTRUCTION LTD v QH and M BIRT PTY LTD — BC8801198 at 19
[9] BC8801198 at 16
[10] This line of action can be traced back to 1621 with "Slade's Case" where the action depended on the fiction that there is a separate and subsequent promise to pay a debt though the debt arises out of a contract. As stated in Pavey and Matthews (1987) BC 8701760

included an enlarged scope, and subsequently Mrs Paul paid Pavey and Matthews what she considered to be a reasonable sum. The plaintiff sued on a quantum meruit basis.

To satisfy the fact that the Builders Licensing Act states that an oral contract is unenforceable, Deane J stated:

> *"It may be that the bringing of an action as on a common indebitatus count would conflict with the apparent legislative policy underlying s 45 if the claimant in such an action were entitled as of right to recover the amount which the building owner had agreed to pay under the unenforceable agreement. I am, however, unpersuaded that the bringing by a builder of an action on the common indebitatus count in which he can recover no more than what is fair and reasonable in the circumstances as compensation for the benefit of the work which he has actually done and which has been accepted by the building owner conflicts with any discernible legislative policy."*

The fact that Mrs Paul gained the benefit of the building works and that the original oral contract was to pay "reasonable remuneration", the case showed that there was an expectation that the consideration for the building works done would compensate for the enrichment gained by Mrs Paul.

As stated further by Deane J:

> *"The mere fact that the reasonable remuneration for the building work done at Mrs Paul's request exceeded Mrs Paul's expectations would not, however, of itself constitute any such identifiable real detriment since it is not necessary for the purposes of s 45 of the Act that a written contract contain either an agreed price for the building work or an estimate of what the cost of it to the building owner will ultimately be."*

Success in a quantum meruit case depends not only on the plaintiff proving that he/she did the work, but also on the defendant's acceptance of the work without paying the agreed

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remuneration. It is evident that the court is enforcing against the defendant an obligation that differs in character from the contractual obligation had it been enforceable[11].

Deane J also discussed the issue of the how the enable the valuation of reasonable remuneration. Deane J raised the issue that to compensate the builder for his work referenced to the increased value of the property, may be less than if the work was valued as a fair market value of plant, labour and materials supplied. *"One such category of case is that in which unsolicited but subsequently accepted work is done in improving property in circumstances where remuneration for the unsolicited work calculated at what was a reasonable rate would far exceed the enhanced value of the property"* said Deanne J. This issue would have to be considered for future cases, as depending on the valuation would give rise to the plaintiff pursuing that line of action.

When a claim is based on completed works, it is obvious that the defendant has a real benefit of the works, and this benefit may be assessed. To assess the benefit of a building that was only partially complete, of still in the concept development stage, would be to a lesser extent and difficult to quantify. In this case the defendant can with no extra cost liquidate the benefit gained by the "contract" works, i.e. the building could be sold and compensation taken from such sale. This action could occur in extreme circumstances.

Pavey essentially demonstrated that it is better for a builder to conduct work without a contract, as the Building Act will prove the oral contract to be unenforceable. From there a quantum meruit claim can result and result in the remuneration for the plaintiff of his reasonable and fair costs for the work. This case has been used in subsequent cases quite extensively, and would appear to be the milestone in general Quantum Meruit claims.

4.4. Renard (1992)

In the Renard contract, the Public Works awarded two contracts for building pump stations to Renard. During the course of the two contracts, Renard was not progressing the works to the satisfaction of the Principal, to the point that resulted in a Show Cause Notice being issued to Renard. Renard responded by issuing a letter[12] which stated that:

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[11] Mason and Wilson JJ. Their decision in Pavey and Matthews v Paul (1987) BC 8701760
[12] RENARD CONSTRUCTIONS (ME) PTY LTD v MINISTER FOR PUBLIC WORKS — BC9203258 at 5

- Renard was willing and able to complete the Contract within a reasonable time; it had twenty employees rostered on ten hour day shifts for 6-7 day weeks;

- Renard considered the action contemplated by the Public Works would be a repudiation of contract and that it would claim for payment on a quantum meruit basis for work carried out if the Principal took the threatened action;

- Renard preferred to be left alone to complete the works;

- Renard also pointed out that the Principal proposed to deliver critical materials for the works at a date which was later than the nominated Practical Completion Date.

After some time, the Principal served notices taking over the works, which lead the Contractor to commence action against the Principal for the wrongful repudiation of the contract. Renard informed the Principal that they accepted their action, and asserted that they rescinded the contract, and began arbitration on the lines of a quantum meruit claim.

The basis for the Contractors argument was that the Principal did not act reasonably in enforcing the provisions of the Clause 44 (Show Cause clause). Renard had increased their productivity, and tried to show cause that it should not be removed, by adding that the Principal was holding up part of the works with the late delivery of their supply items.

The outcome of this is that the Principal must act reasonably and in good faith. This comes from the Court of Appeal decision, where: *"The contract contained ad hoc implied terms and terms implied by law that the principal would give reasonable consideration to the question whether the contractor had failed to show cause against the exercise of the power and if the contractor had failed to do so whether the power should be exercised"*[13].

In addition, the Court of Appeal judgement included that the reasonable remuneration for the contractor was not subject to any ceiling derived from terms of the contract. However, in the original case[14] Brownie J discussed that Renard was on a losing contract, and had progressed the works both badly and slowly. In that case, he concluded that it is the value to the recipient of the work which is to be measured rather than the cost to the party doing

[13] BC9203258 at 1
[14] RENARD CONSTRUCTIONS (ME) PTY LTD v MINISTER FOR PUBLIC WORKS (1992) 26 NSWLR

the work. This view is contrary to the decision from Jennings v Birt where Cole J considered that the plaintiff was entitled to the cost of performing the works. In Renard, a broad statement could be made that Renard did not progress the works in a reasonable manner, but Birt had built a case of delay and disruption borne from the Principal there placing restrictions on Birts progression of the works.

The Renard case holds the significance that if a show cause notice is served, and the client terminates the contract wrongfully, then the contractor will be entitled to his costs to a reasonable extent. Where this ended was in the Supreme Court, Court of Appeal that the issue reasonable costs do not extend to profit.

4.5. Brenner v First Artists' Management [1993]

The Brenner versus Firsts Artists' Management case was very complex and contained several plaintiffs, defendants, and cross claims. Byrne J noted that the Brenner case had *"… given me cause to pause, for the case was long and the law was not easy"*

Essentially, Brenner and Fenner had supplied services to First Artists Management (FAM). After a time FAM terminated the managers services prior to releasing an album. The manager sued FAM on the basis of a quantum meruit claim, with the value to the plaintiff of that which had been previously been agreed.

As FAM had terminated the contract, which is the classic rescission, then a claim for what the contractor is due essentially follows. The distinction in the Brenner case is that the benefit to the plaintiff is more obtuse, as there was no value to the defendant. This distinction stands out compared to the Sabemo case where the benefit was quite real, but the project did not progress for reason beyond the control of the defendant.

In the cases of Pavey and Matthews, Jennings, WC Gray, and to a lesser degree Sabemo, all had a tangible benefit to the defendant in some useable state, whether it was in the form of a building or part of a contract completed. In Brenner, there were only the services that the managers had given to the plaintiff, and then these services were questioned as to their value. As argued by FAM's council, there was no proven economic benefit of these services to Braithwaite.

Byrne J stated that *"There is no requirement that "benefit" for the purpose of the rule of restitution in a claim for payment for services must be an economic benefit. Nor is there a requirement that the provider of the services show that any benefit has arisen as a direct consequence of a particular service rendered*"[15]

Byrne went on to state that: *"Furthermore, I find that the mere fact that Braithwaite had a manager was of benefit to him and that it was of benefit to him that that manager was Fenner and later Nathan Brenner as well. Moreover, he was thereby relieved of the worry of finding another manager"*[16]

As a result of these findings in the Brenner case, the benefit to a defendant is extended from one which is real and identifiable, to one that is unusable, and no perceived benefit at all. The benefit is said to be have the service available to the Client, not necessarily if it can be converted into some other tangible benefit. This extends Sabemo's case where there the benefit was held on a proposal that could not be used by the Client. The Brenner case has a significant impact on the project management area, as this area can be based on service related contracts where the benefit to the Client is purely in the service provided, hence the party physically being there, not necessary the value of the work they produce. Hence, one would have to thorough investigate and evaluate the parties in which they intend to engage for services contracts, as their performance or work standard will probably not be in question.

4.6. W C Gray (Constructions) 2000

In the case of W C Gray, the transcript detailed that the appellant did building work for the respondent at her Belrose home. The works were quoted on a budget estimate, and works commenced without a written agreement. During the work changes occurred to drawings and other variations to the scope of works. Subsequent to such, a dispute ensued.

[15] BRENNER and Another v FIRST ARTISTS' MANAGEMENT PTY LTD and Another — [1993] 2 VR 221 at 222

[16] [1993] 2 VR 221 at 260

The appellant sued in the District Court for the balance of moneys claimed but not paid, and the respondent cross-claimed for damages for delay and defective work. The entire matter was referred out to a referee, Mr Chapman, for inquiry and report.

The W C Gray case mirrored Pavey and Matthews v Paul case insofar as it being an oral contract. However, it could be likened to the unsuccessful case of Morrison-Knudsen v British Columbia Hydro and Power Authority (1991) 7 ConstLJ where the plaintiff had completed the works under the contract, but had suffered delays and claimed for payment on a quantum meruit basis. However, in the Morrison-Knudsen case, by completing the contract, this had negated their entitlement to claim for breach, as the contract was completed. The subtle difference from Morrison-Knudsen is that while the contract was completed, under the definitions under the statute, the contract, as it was an oral contract, was unenforceable.

Here, the key to the Gray case was that the works were completed, with a positive benefit to the Defendant, and the works were freely accepted.

The valuation of the claim is where this case started to move away from the precedence. The Quantity Surveyor (QS) determined the value of the works from the point of view of: "*What he was emphasising was that the builder was not entitled to its actual expenditure plus some margin"*[17]*.*

However, the result was that the valuation of the works included the market cost for each item plus an amount for profit and overhead. In particular, the overheads included: "*Preliminary assessment of costs already included some profit margin and that what was being ascertained by Mr Zacos was the value to the builder of the work done".*[18]

In the delay claim, the issue at [33] was the "value to whom" asks Mason P, where in the example given; the Leading Hand was valued at $1400 per week as a cost. But whether this was the costs to the company, or the value that the individual could earn for the company, does not seem to be resolved, and only the profit and overhead margins should be applied.

[17] W C GRAY (CONSTRUCTIONS) PTY LTD v HOGAN — BC200000871 at [18]
[18] BC200000871 at [18]

The Gray case steps past the Renard case, specifically as here the builder was granted in his remuneration an amount for profit, where Renard it was specifically stated that his costs should be reimbursed. This brings in other several notions that could be argued for loss of profit from unable to preform other contracts (maybe more profitable), which would make sense that, as a contractor, it would be better to walk away from a contract where you are confined to only receive your costs, should it end up in court, and pursue more profitable work.

Generally, the cases in which a quantum meruit line of argument is reached is one where either there is a clear frustration by one or both parties, as in the case of Jennings v Birt, or one where there was no contract or agreed price originally, as in Gray or Pavey. Others are where there has been significant amount of work as a preferred tenderer but the works did not proceed (and the circumstances allow quantum meruit).

Section 5 will discuss the subsequent treatment of these claims in later quantum meruit based claims

5. Subsequent treatment of claims

In assessing the findings of the six cases discussed in Section 4, a basis model can be outlined for subsequent claims. Hence, quantum meruit claims may generally fall into the following categories:

- Work completed, but with no contract, with no prior agreement to price
- Work completed, but before a contract could be finalised, the Client or Principal cancels for their convenience.
- Work is being completed within an agreed contract, but the Client or Principal cancels the contract wrongfully or for their convenience.
- Work is being completed within an agreed contract and the nature and type of the work (be it thru variations or schedule of rates) becomes significantly different to that in the original contract.

The result of the ability to make claims in this manner strongly indicates that the Client or Principal must exercise due care in managing the contract, especially when the Contractor is not progressing the works suitably. The care required is that the Contractor may be on a losing contract and are purposely not progressing the works due to financial constraints. The Client's options may include issuing a Show Cause notice and taking the over the works. However, if the Client has contributed to the problem or delays it may constitute a substantial breach on their party, and in turn they may be likely lose in a quantum meruit claim.

The specific cases used in the case investigations detailed in Section 3 and 4 have been used for reference in subsequent cases, as precedence on which they base their argument. Although some have been referenced, more than others, the collective significance focuses around works that were undertaken and reasonable remuneration are required for the same works.

Jennings v Birt and Renard v Nth Sydney Council were similar cases in which "show case" notices had been served, after a time the respective Clients cancelled their contracts. In each case, it was proved that the cancellation was in effect repudiation. Hence, a quantum meruit claim flowed because of a benefit to the client. The assessment of unjust enrichment was distinguished in the two cases:

1. Birt exercising diligences in notifying the Jennings that they were going to be unable to complete the works unless they could develop new borrow sites. There the show cause notices was clearly a breach of contract as the contractor was unable to progress the works. In this case, the Principal was clearly in breach for serving the show cause notice, and then excluding Birt from the project, as the Principal was the main contributor to the delays on the project. Whether Birt was in financial or contractual trouble on the project before the contract was cancelled is irrelevant, as Birt tried to inform their Client that there were delays beyond their control.

2. In the Renard case, Renard was not progressing the works in a suitable manner. Brownie J had noted that they were performing the work badly and too slowly. In this case, the repudiation was a combination of not realising

that the contractor was attempting to show cause with increasing resource levels on site, and the Client had failed to delivery all items required for the completion of contract works. Again, the Client was a contributor to the delays of the project, but it is unclear whether the lack of their supply of materials was the sole cause of Renard's delay in completing the project. If the Client (Public Works) followed a less adversarial route, Renard may have completed the project works, and the Client would not have had to pay for Renard's costs of works to date in a quantum meruit assessment, they would merely have had to pay the contractual amounts due.

In the cases of Pavey and Gray, both were oral contracts for works, which under the Building Act are unenforceable. In both cases, the works had been complete, and both Client's respective did not pay the builders reasonable compensation for works.

In Pavey, after a few trials and appeals, the contractor received a decision that there had been a benefit to their Client, and that even though there was an unenforceable oral contract under the Building Act; this fact resulted in there being an unjust enrichment. Hence, restitution of the unjust enrichment was required from the Client for compensation to Pavey, in a manner that was fair value of the benefit provided. The issue is whether the fair value of the benefit included profit and overhead is clear and easily quantified. Deane J commented that the benefit should be determined in terms of reasonable rate, presuming that he means that the builder's costs are met, rather than the benefit or the "enhanced property value". Deane J stated that the "enhanced property value" would be far less that the "reasonable rate"; hence, one could extend this to the contrary argument.

In Gray, they referred to Pavey and used the same argument that the claim should be valued on the basis that "fair and just restitution", where both parties agreed. They also agreed that a decision in a previous court was in error. The distinction of this case compared to Pavey is in the valuation of the remuneration. This court had held that the builder was entitled to costs plus an agreed margin; in this case, the margin was 10%. It went further to note that in are of delay of the claim, the labour had not only a cost to their employer, but had a value of their worth to the builder, the value being 10% on the cost. Hence, reasonable rates and agreed margins must be representative of the circumstances and their value to the project.

In the case of Sabemo, contractors demonstrated that they could claim for compensation for work done in a post tender pre-award and preferred contractor developing proposals, when the Client cancels the project for their own convenience. In Sabemo, the developer cancelled the project after many proposals had been developed, and before the award of the contract to Sabemo. Sabemo's case was that the compensation for the work done pre- award. While Sabemo were the preferred contractor, their works were undertaken in anticipation of the contract works, where consideration would flow. Contemporary contracts requiring proposal development can have the contractors spending large amounts of money to satisfy all parties, whether they be included or excluded in the contract arrangements.

The particular nature of the Sabemo case was that the benefit to the North Sydney Council was unusable, as the proposals were specific to a particular site and that there was no alternative to use the proposal on another site. So the notion of benefit was extended to include where a proposal has been accepted by the Client, but unusable anywhere else. As the client cancelled the project, the proposal were still considered a benefit, should the project progress.

Brenner v First Artists Management was a case that showed that the definition of benefit was extended further to include service contracts, where the mere attendance was a benefit to the Client. This would be able to be extended for project management contracts, and the like, where there is no tangible benefit apart from them performing a service, that the Client would not have to perform.

As there is compelling cases that when a contract is wrongfully cancelled, most contracts have a termination clause or clauses within. Basically, if a contract is terminated for the convenience of the Client or the Principal cancels the head contract, then the Contractor receives payment for the works done as per the contract and payment for the extra costs in leaving the site.

Notwithstanding the contractual agreed prices, this leaves whether a contractor should receive his reasonable and fair remuneration in line with the contract, or that the cancelled contract (if it existed) is not considered. There is reasoning that if the contract is rescinded ab initio, then the contract cannot be used a ceiling for remuneration, as it legally does not

exist. This is especially true for contracts that like Birt and Renard where there were delays; hence applying the contract was not possible. If the contract is terminated in futuro, then, as per the termination clauses, the contractor would expect to receive a valuation of the works complete based on the contract plus an amount for the demobilisation and making safe the works.

In viewing significance of case findings, as contained in the case investigations in this research, and reviewing and understanding these case outcomes, a basis can be established for evaluation and formulation of future quantum meruit claims. In an ideal world, one might believe that through this knowledge, the circumstances from which the claims arise might be avoided on future contracts. In the real world, armed with this knowledge the best entitlements can be progressed for works undertaken and benefit received. The impact of the findings of case investigations on future cases is discussed in Section 6.

6. Considerations for Future Claims

In the current climate, ever increasing costs are experienced and but contract works are still tendered on rates that have not varied much in the past 5 years. The profit margins are also very tight, and many have known revenue to be as low as 3% on project works. It has been known, whether by urban myth or reality (as no contractors were willing to admit to such), that some contractors would make up the short fall in a contract by pricing the tender low, and hoping to claim additional revenue by means of every possible variation along the way. This could mean the difference between losing money on a contract to a profitable contract.

Therefore, by the same logic, attempting a quantum meruit claim at the end of a contract, by “setting up” the Client, following the logic from Birt or Renard, may seem like a reasonable means of obtaining reasonable payment, and ultimately be quite rewarding. However, reality is that quantum meruit claims are generally hard and expensive to prove. If the Client or whoever is administering the contract is reasonably competent then the likelihood of a quantum meruit claim is very much reduced. This type of approach would

be unusual, and difficult to maintain. If it did succeed, the chance that it could be repeated on subsequent projects is significantly reduced, and that is if the contractor is actual awarded another contract after the knowledge of this practice gets around.

Resultant from the cases reviewed and personal experience in many contracts, the more likely initiator of quantum meruit claims are when the nature of the works ends up different than that described in the contract, both in scope and in sequence. This is a distinctly different situation compared to projects where there was no contract, or the contract ends up being rescinded. The practice of quantum meruit based on works that significantly different in nature and scope is understandable, as the contractor may have priced exactly the prescribed works, and could not accommodate changes without increased costs. If the changes are brought about by the Client, after the contract progresses, then the contractor should be entitled to reimbursement of costs. Though, it may be easy way for a less competent contractor to claim additional costs to ensure profitability, hence the assessment of allocation of delay, disruption and progress.

There seems to be contracts that always balloon in their nature with respect to revenue and amount of work. The administration from contractor needs to be sufficient so that the claims are relatively easy to prove. It is always preferable to present these claims while the contract or at least the work is on foot. Management of contracts where there is delay and disruption, or a large amount of variations or both are hard to administer from the point of view of the contractor or the client. The volume of variations will mask the true impact that the variations are having on the costs for the project. Variations rarely have delays and disruption to works included in the price, either from the Contractor, and if so, approved from the Clint the addition of incidental delay and disruption from and to other works. It is only when the contract is almost over doing the true magnitude of the costs for the extra works is realised.

The ease at which the claim can be achieved depends also on the Client, and their attitude to the contract and the contractor. Generally a good relationship between parties can change immediately for the worse, as soon as delay and disruption is mentioned. From there, the impediments that the Client would introduce would steer the contractor to a quantum meruit claim, as a last resort.

Determining benefit and unjust enrichment is generally predicated by the case history available, but moreover the amount of site records and correspondence available at the end of a contract.

However, it is still imperative to try all other avenues for restitution during a contract where there have been influences out side the control of the contractor, before embarking on a quantum meruit claim. Depending on the contract, starting claims for through delay and disruption, or try some global claims if it is a schedule of rates that the scope of works has increased beyond any original indication of the contract. The Trade Practices Act could be tried through unconscionable conduct, or misleading statements, or misrepresentation. Alternatively arbitration can be attempted, and hope the loser of that does not appeal against it. These are all easier, and most of contract disputes would end up here, as the outcome, while not enormous are relatively more controllable.

7. Conclusion

Quantum meruit claims have come along way, as stated by Justice Byrne in 1997, that restitution and quantum meruit claims *"has no peer other than the law of negligence or, more recently, the statutory rights flowing from misleading or deceptive conduct".*

The question is, could this result in a less controlled outcome due to the peerless nature?

The concept of benefit has matured from the purely tangible usable notion in Pavey & Matthews v Paul, where Mrs Paul could move in and enjoy her building, to cases like Sabemo and more so in Brenner, where Daryl Braithwaite's relaunching of his singing career did not happen, but the case showed that there was a benefit of the management to Braithwaite. It will be hard to identify any new or extended definitions for benefit or enrichment, as with most legal cases, few ever make it to a trial judge and reporting, and so cannot be use as precedential value for subsequent cases, although it would be certain that new lines of argument continue to rise.

In general, most cases are resolved in the dispute resolution process in arbitration, at mediation, at court appointed arbitration, or immediately before the case is heard. These

cases will use the precedential value of the standard cases to quote the likes of Pavey and Matthews v Paul, Sabemo v NSC, and so on, but the position or likelihood for new cases can only have the existing heard cases, and the individual's experiences with claims.

The number of claims that pursue the quantum meruit line of argument, and the ones that make it to trial, could be thought of as a notional ratio of 200: 2, where the 2 that end up in trial are the cases where the Client and the Contractor cannot agree on whether it is day or night. Most claims in the sense of the construction arena are settled in mediation, if not before, and are essentially a game of poker, where the existence of benefit and unjust enrichment are all agreed, but what is at large is anticipating how far the other party is likely to go or hold out.

One can only hope that through the knowledge of circumstances that lead to quantum meruit claims, practices could be avoided or modified to reduce that chance of ending up in this situation of a claim. If this is not possible, as often case outcomes include events beyond anyone control or fault, then armed with the knowledge of what is a plausible or an acceptable argument for quantum meruit, parties can best establish themselves for the best outcome in a claim, whether it be from purely winning point of view or maximising the amount of remunerations received. In the end, most contractors only want a reasonable amount for the works undertaken, as no one goes into business to lose money (although if often can be attributed to the own fault). Clients must also recognise that works need to be directed appropriately to not cause additional costs to parties, and if it does then the resultant costs need to be reimbursed.

The coming years will tell whether the line of arguments changes or developed in quantum meruit area. Hence, whether involved from a Client/Principal or Contractor perspective, one would need to constantly review and gain further understanding of current cases to ensure they understand the exposure and entitlements, and hopefully avoid the claim situation.

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